United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1282

To be argued by
GREGORY L. DISKANT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1282

B/S

UNITED STATES OF AMERICA,

Appellee,

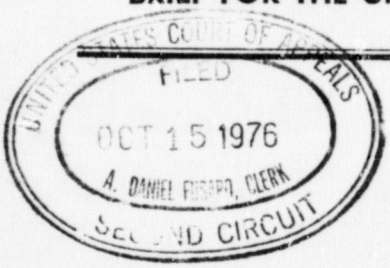
—v.—

LOUIS C. OSTRER,

Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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United States Attorney for the Southern District of New York, Attorney for the United States of America.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GREGORY L. DISKANT, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of OCTOBER, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

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Gregory L. Diskant

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Jeanette Ann Grayer

JEANETTE ANN GRAYER
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LOUIS C. OSTRER,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Louis C. Ostrer appeals from an order, filed June 4, 1976, in the United States District Court for the Southern District of New York by the Honorable Charles L. Brieant, United States District Judge, denying, after a three-day hearing, Ostrer's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

Indictment 71 Cr. 558, in 40 counts, was filed on May 27, 1971. Count One charged nine defendants, including

Ostrer, with conspiring to violate provisions of the federal securities laws (Title 15, United States Code, Sections 77q(a), 77x, 78j(b) and 78ff) and the mail and wire fraud statutes (Title 18, United States Code, Sections 1341 and 1343), all in connection with the manipulation of an over-the-counter stock named Belmont Franchising Corporation. Counts 2 through 23 charged Ostrer and others with substantive violations of the securities laws and Counts 24 through 40 charged Ostrer with substantive violations of the mail fraud statute committed as part of the conspiracy.

The trial of Ostrer and his co-defendant John Dioguardi commenced before Chief Judge David N. Edelstein on January 4, 1973.* On January 26, 1973, the jury found Ostrer guilty on Counts 1, 9, 16, 17, 18, 19, 31, 33, 34, 35 and 36, and not guilty on six other counts.**

On March 1 and March 12, 1973, respectively, Ostrer and Dioguardi moved for new trials on the basis of a juror's alleged mental incompetence. On April 12, 1973, Judge Edelstein denied the motions and sentenced Ostrer as follows:

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* Of the other seven defendants named in the indictment, three entered guilty pleas and three were convicted after a separate trial, see *United States* v. *Greenberg*, Docket No. 72-2368 (2d Cir.), *aff'd from the bench*, February 16, 1973. The indictment was not tried as to Morris Winter, a cooperating defendant, who pleaded guilty in a related case.

** The trial court had acquitted Ostrer of the remaining twenty-three counts upon motion.

Dioguardi was found guilty on Counts 1, 16, 17 and 31, and a mistrial was declared as to him on fifteen other counts as to which the jury could not reach a verdict.

Count	*Term*	*Fine*
1	3 years *	$10,000
9	3 years *	$ 5,000
16	2 years *	$10,000
17	2 years *	$10,000
18	2 years *	$10,000
19	2 years *	$10,000
31	3 years *	———
33	3 years *	———
34	3 years *	———
35	3 years *	———
36	5 years **	———

Ostrer's and Dioguardi's convictions were affirmed on appeal. *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974).

On December 11, 1974, Ostrer filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. He claimed that during his trial the Federal Government had knowledge of conversations between Ostrer and his attorneys in violation of Ostrer's Fourth and Sixth Amendment rights.

A hearing was held on Ostrer's motion on March 1, 3 and 4, 1976. On June 4, 1976, Judge Brieant, to whom this motion was transferred after Ostrer moved to disqualify Judge Edelstein,*** denied the motion. Judge

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* Prison terms to run concurrently.

** Execution suspended, one day's probation.

*** Ostrer's motion for recusal of Judge Edelstein was based on excerpts from a book entitled The Benchwarmers, authored by Joseph C. Goulden (1974), which contained references to statements Judge Edelstein allegedly made to the author concerning the Ostrer-Dioguardi trial. (*Id.*, at 101-103). Judge Edelstein ultimately determined that, while there was no legal justification for his disqualification, his upcoming trial of the IBM anti-trust case required that he transfer this matter to another Judge.

Brieant's denial was accompanied by a 44-page opinion, constituting the Court's findings of fact and conclusions of law. (App. 676-730).* This appeal followed.

Ostrer remains free on bail, as he has since the date of his conviction on April 12, 1973.

Statement of Facts

The Hearing on Ostrer's Rule 33 Motion

A. Synopsis

Ostrer's new trial motion was based on his claim that, as a result of illegal electronic surveillance by New York State authorities prior to and during his federal trial, information that prejudiced Ostrer's right to a fair trial was provided by state officials to the federal prosecutor. More specifically, Ostrer claimed (1) that the State illegally intercepted a conversation between himself and Julius November, a friend and lawyer; (2) that the State turned over to the prosecutor in charge of his federal trial certain information that was derived from this intercept; and (3) that this information caused the federal prosecutor not to call one Aubrey Moss as a Government witness at Ostrer's trial. Ostrer maintained that had Moss testified as a Government witness, his testimony, developed by cross-examination, would have aided the defense.

After a three-day hearing during which ten witnesses testified, Judge Brieant denied Ostrer's motion. Judge

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* The designation "App." refers to appellant's appendix; "App. X" refers to appellant's appendix of exhibits; "Br." refers to appellant's brief on appeal.

Brieant found that, though the State had electronically surveiled Ostrer, the surveillance was conducted without the knowledge or participation of the Federal Government and pursuant to court orders that, while later declared invalid, were believed by the state officers to be lawful during the surveillance. He further found that during the State's investigation a police officer recorded a conversation between Ostrer and Julius November on November 21, 1972, approximately two months before Ostrer's trial. The police officer had no reason to believe that November was an attorney, and members of the Manhattan District Attorney's Office who later listened to the recording concluded reasonably and in good faith that the Ostrer-November conversation concerned a plan unlawfully to coerce a witness by the name of Moss not to testify against Ostrer in an upcoming federal trial. The state authorities, "motivated solely by a high-minded sense of ethical obligation to insure proper and unobstructed administration of federal criminal justice" (App. 707), set up a meeting with the federal prosecutor in Ostrer's case, and informed the federal prosecutor only that they had information that Moss might be tampered with. The source of this information was deliberately withheld from the federal prosecutor, and he had no reason to believe the source was electronic surveillance.*

Judge Brieant found not only that the State provided this information to the Federal Government in good faith, but also that the information had no effect whatso-

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* The state authorities also informed the federal prosecutor that a private investigator by the name of Jim Lynch, believed to be a federal employee, had been retained by Ostrer. With respect to this information, Judge Brieant found that it had no bearing on the issues in Ostrer's trial and the Government's knowledge of the investigator was not used to Ostrer's detriment. No serious claim is raised by Ostrer on appeal that this finding was erroneous.

ever on the federal trial. Prior to receiving this information from the state authorities the federal prosecutor had interviewed Moss and, based on his belief that Moss would be an untruthful witness, had decided not to call him to the stand. Moreover, Judge Brieant found that Moss' testimony would not have aided Ostrer's defense and that, in any event, the defense made inadequate efforts to obtain Moss' testimony.

Based on these findings of fact, Judge Brieant rejected Ostrer's Fourth Amendment claim because the defendant had failed to make an adequate showing of taint and because the Government adequately demonstrated that the federal trial was conducted, and the evidence derived, by means sufficiently independent of the illegal wiretaps.* The Sixth Amendment claim was found deficient as well. The Court rejected Ostrer's claim that a Sixth Amendment *per se* rule of reversal should be applied, since the Court found that the actions of both the federal and state authorities, rather than being "corrupt," were "pursued in complete good faith." (App. 708). And, carefully scrutinizing the conduct of the federal and state officials, the Court concluded that Ostrer had suffered no prejudice in fact as a result of the intrusion on the attorney-client conversation. Accordingly, Ostrer's Sixth Amendment rights were not violated.

B. The State's Investigation

On October 25, 1972, while Ostrer was awaiting trial on his federal indictment, the state commenced electronic surveillance of Ostrer's office and phones located at 377 Fifth Avenue, New York, New York. The surveillance

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* Ostrer has raised no claim of error with respect to this determination.

—at all times conducted pursuant to orders issued by Justices of the New York Supreme Court—continued until February 21, 1973, after Ostrer's trial, and was part of an investigation of Ostrer initiated by the Rackets Bureau of the District Attorney's Office of New York County. The investigation was principally directed at obtaining evidence of criminal usury and was later broadened into an investigation of crimes committed by labor officials. (App. 209-10, 678-79).*

The surveillance monitoring plant was staffed only by New York City police officers on assignment to the Rackets Bureau. The officers tape-recorded conversations that were later summarized in plant reports. To preserve security, the plant reports were provided only to persons affiliated with the District Attorney's Office. (App. 679).

C. The November 21, 1972 Conversation

During the course of the State's court-ordered eavesdropping, Detective Walter Finley of the New York City Police Department overheard a conversation on November 21, 1972 between Ostrer, William Kilroy and Julius November, a lawyer.** (App. X 80-99). Throughout this conversation, Detective Finley was unaware

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* The Federal Government at no time participated in this investigation. (App. 165-66, 209, 250-51, 341).

** Although November was not Ostrer's retained counsel in the federal proceeding, admittedly had never tried a federal criminal case and gave Ostrer legal advice that was somewhat less than astute (App. 683-84), Judge Brieant found that for purposes of this motion Ostrer reasonably believed November to be acting as his attorney during these conversations. (App. 682).

that November was a lawyer. (App. 54-55, 172, 681-82).*

As the Detective listened to this conversation, which began with a discussion of loans, he concluded that he was overhearing preparations for a crime, *i.e.*, the coercion of a man by the name of Moss, a potential witness at a trial. (App. 687). Ostrer and Kilroy began by discussing the fact that November owed Ostrer $5,000. Moments later, November entered Ostrer's office and demanded a $1,000 check. Ostrer and November then began a crude and unpleasant shouting match, with November accusing Ostrer of manipulation and welching on a $6,400 debt which has been outstanding for 17 weeks. (App. 682-83; App. X 81).** November then handed Ostrer a typewritten statement he had prepared, signed by Susan Gold, an employee in Ostrer's office.*** From the ensuing conversation, it could be inferred that the typewritten statement disclosed that Aubrey Moss, a married man whom Ostrer and November believed would be a Government witness in the federal trial, was having an adulterous affair with Gold. November said to Ostrer:

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* The conversation was not of a sort that would have immediately alerted Detective Finley to the fact that November was an attorney, and Judge Brieant so found (App. 687). It began with discussions between Ostrer and Kilroy about November's and Ostrer's debts. November then entered the room demanding $1,000 and claiming that Ostrer had owed him $6,400 for 17 weeks. The shouting matches and liberal use of obscenities that followed hardly signalled the entry into the room of an officer of the Court. (App. X 80-99).

** The discussion of outstanding loans placed the conversation squarely within the scope of the State's eavesdrop warrant for usury. Moreover, once Detective Finley had begun to hear discussions of a future crime, he was fully entitled to continue his eavesdropping. See N.Y. Crim. Proc. Law § 700.65(4) (McKinney's 1971); 18 U.S.C. § 2517(5).

*** The statement is reproduced at App. X 166-68.

> "What girl would go out and do like this girl? This fuckin Moss is ruined. He ever takes the stand he's wrecked all over. Read this shit. Read it." (App. X 83).*

Ostrer then asked: "What do you want me to do, give her a $400 raise?" to which November replied. "Nah. She wants a stinking $10." (App. X 84).

November again complained about Ostrer's failure to pay his debts and another loud and unpleasant exchange ensued. Ultimately, the conversation returned to the written statement. November reiterated that Moss would not take the stand, because he'd be "disgraced." Ostrer asked if this was "blackmail" to which November replied that Susan Gold could approach Moss in a restaurant where Moss would not be wearing a device that could record the conversation: "*Nobody will be around*, we know who the hell, *if she's sitting with him in a restaurant he's gonna be wired?* This is blackmail?" (App. X 85) (emphasis added).

November then remarked that he believed Moss would never take the stand if he got wind of the statement; but he added that, if he did take the stand, the statement could be used either to impeach Moss' credibility by showing that he was a "whoremaster" or to impeach Susan Gold if she were "reached" by Moss. (App. X 86-87). November also advised Ostrer that he should show the affidavit of Ostrer's attorney, Maurice Edelbaum, only if Moss were to be a witness, a caution he twice repeated. (App. X 94-95, 96).

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* More lengthy excerpts of this recorded conversation are reproduced in footnote 7 of Judge Brieant's opinion. (App. 722-27). The conversation appears in full at App. X 80-99.

November then repeated his view that Moss would not take the stand, at which point Ostrer asked, "How do you get to him to let him know you got this?" (App. X 98). November's answer was that they should wait to hear what Moss talked to Susan Gold about tomorrow. He noted that Gold might well tell Moss that, if he took the stand, she would "show what a low skunk" Moss was. (App. X 98).*

D. Subsequent Actions of the District Attorney's Office

Concerned about an attempt to commit the state crime of coercion of a witness,** Detective Finley dis-

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* In a phone conversation 9 days later on November 30, 1972, between Moss and Susan Gold (App. X 104-117), Ostrer entered his office and found Gold on the phone. Gold asked Ostrer to leave the office while she was engaged in conversation at which point Ostrer asked who she was talking to. When Gold replied, "Moss," Ostrer said, "fuck him. Hang up on him. Let's forget about it." (App. 601).

Ostrer claimed below that this conversation showed that by November 30 the plan to intimidate Moss was at an end and that the State officers overhearing this conversation should have realized that. Judge Brieant rejected this reasoning (App. 689), finding that this conversation was clearly ambigious and would not necessarily have led an overhearer of both the November 21 and November 30 conversations to conclude that the plan to intimidate Moss had been abandoned.

** Section 135.60 of the New York Penal Law (McKinney's 1975) provides in pertinent part that:

> "[a] person is guilty of coercion in the second degree when he compels or induces a person . . . to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will: . . . [e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule."

See also 18 U.S.C. § 1503; *United States* v. *Cioffi*, 493 F.2d 1111, 1118-19 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974).

cussed this matter with fellow officers. Ultimately the matter was brought to the attention of Assistant District Attorney John Fine who was in charge of the District Attorney's investigation of Ostrer. (App. 687-88). Fine, who "was reasonably and properly concerned about what appeared to him to be the coercion of a prospective federal Government witness" (App. 690),* discussed the Ostrer-November conversation on December 21, 1972 with Chief Assistant District Attorney Alfred Scotti. The two State prosecutors agreed that they were duty-bound to alert the federal prosecutors to a potential obstruction of justice.** However, because of legitimate concern for the security of their own investigation, they agreed that the Federal Government should not be told the source of the State's information. (App. 691-92).***

Scotti then attempted to arrange a meeting between Fine and the Assistant United States Attorney in charge

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* Judge Brieant did not find it necessary to determine whether Ostrer and/or November actually violated state or federal law or actually planned to do so in the November 21 conversation. He did find that the state officials concluded in good faith that on obstruction was in the offing and that they had a reasonable basis for their conclusion. (App. 689).

** The prosecutors also determined to expand the State's investigation to include the perceived attempt at coercion. On December 22, 1972 State Supreme Court Justice Jacobs Grumet signed an order authorizing the continuance of the electronic surveillance in part on the ground that the State now had reasonable grounds to believe that evidence of the crime of coercion in the first degree might be obtained thereby. (App. 690). No state or federal prosecution for coercion was ever brought, although Judge Brieant noted that the fact that November and Ostrer were not prosecuted did not suggest that a crime had not been committed. (App. 727-28).

*** The State's concern about security was heightened by their incorrect belief that Ostrer's private investigator, Jim Lynch, had a current employment relationship with the Federal Government. (App. 691).

of Ostrer's prosecution. He phoned Robert Morse, then United States Attorney for the Eastern District of New York. Morse informed Scotti that the Eastern District had no case against Ostrer.* Scotti then called Mollo, then Chief Assistant United States Attorney for the Southern District of New York. Scotti told Mollo that he had some information that might be of interest to the Assistant handling Ostrer's case and suggested a meeting be set up between the Assistant and John Fine. Scotti did not mention Moss' name to Mollo or the source of this information. (App. 693).

Mollo conveyed the message to Assistant United States Attorney Harold F. McGuire, who had responsibility for the Ostrer-Dioguardi prosecution. Mollo suggested that McGuire arrange a meeting with John Fine of the District Attorney's Office, telling him that Scotti had called to suggest that Fine had information relevant to the Ostrer case. (App. 693). McGuire set up a meeting for the next day in Fine's office.

At the meeting the next day,** Fine told McGuire that Ostrer possessed certain information about Moss that might be used to effect an obstruction of justice. Fine did not reveal the source of this information, nor did he recommend what should be done with the information. McGuire responded that there was no need to worry about an obstruction of justice, because it was not McGuire's intention to use Moss as a witness in the Government's direct case. (App. 390, 394-395, 694-95).

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* Judge Brieant noted in a footnote to his opinion that the limited meaning and effect of the Ostrer electronic surveillance was revealed by the fact that the District Attorney's Office did not even know in which federal district the case was pending. (App. 728).

** The meeting between McGuire and Fine was attended by at least two New York City police officers, Detectives John J. O'Rourke and Denis P. Brennan. (App. 237, 241, 256, 326-27, 375).

Based on McGuire's testimony, Judge Brieant found that McGuire had reached the conclusion that Moss would not be helpful as a Government witness "independently and prior to meeting with Fine." (App. 694-95). He had reached this conclusion because, after reading Moss' Grand Jury and SEC testimony and interviewing Moss in his office, he believed that Moss would not be a truthful witness.*

Fine, who was concerned that any unusual actions might alert Ostrer to the State's investigation, asked McGuire not to do anything differently in preparation for the federal trial. (App. 695-96).** So as not to tip Ostrer off to the fact that there was a state investigation of him, and to the fact that the Government's primary witness would not be Moss, but rather co-conspirator Michael Hellerman, McGuire instructed an SEC investigator to contact Moss to be certain that Moss realized he was under subpoena for the trial.*** Indeed, on December

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* Moss, an experienced businessman, told McGuire, as he had earlier testified, that he had purchased 2,000 shares of worthless Belmont stock simply because Ostrer told him it was a good investment. McGuire disbelieved Moss when Moss denied that Ostrer had told him the stock was a safe investment because it was being manipulated.

** During the interview, McGuire asked for any helpful cross-examination material that Fine might have. McGuire received nothing except for a certified copy of Ostrer's prior state conviction and a transcript of the plea to those charges, both matters of public record. (App. 696).

Fine also told McGuire that there might be a security problem in the United States Attorney's Office because Jim Lynch, an investigator associated with Ostrer, might be on the Government payroll.

*** At the time of McGuire's meeting with Fine, Moss was already under subpoena. McGuire had caused a subpoena to be served on Moss on December 20, 1972 (App. 728), as well as other witnesses he did not actually intend to call. (App. 379), so as to protect the identity of the Government's "surprise" witness, Michael Hellerman. (App. 405-06, 696).

29, 1972, Fine telephoned McGuire to inquire whether Moss was under subpoena and recommended that the subpoena be kept in effect. (App. 696).*

There were no further contacts between the State and the Federal Government until after Ostrer's trial. On April 18, 1973, some two months after the State's electronic surveillance had come to an end, Fine informed McGuire that the information regarding attempted coercion of Moss had been obtained from electronically intercepted conversations between Ostrer and November. (App. 697).

On February 4, 1975, long after Ostrer's federal conviction and after the filing of the instant motion for a new trial, a New York State Court held that prior wiretap orders for residences of persons other than Ostrer had been granted without an adequate showing of probable cause. Since conversations intercepted pursuant to those orders served as the basis for the issuance of the warrant authorizing electronic surveillance of Ostrer's office, the District Attorney's Office conceded that Ostrer's wiretap was "fruit of the poisonous tree." (App. 702-03).

E. Judge Brieant's Conclusions of Law

Based on the foregoing facts, Judge Brieant reached the following legal conclusions.

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* Judge Brieant found that:

"McGuire was willing to keep Moss under subpoena to accommodate Fine, and because he could not be certain that some circumstance might not develop at trial making Moss' testimony significant. Furthermore, McGuire testified, and I find, that he wanted to conceal the fact that Michael Hellerman a co-conspirator and co-defendant on this indictment, would testify and be the lynchpin of the Government's case." (App. 696).

Initially, he rejected Ostrer's Fourth Amendment claim. He did so, first, because he found that the State and Federal Government had not acted improperly. The state authorities were unaware of the deficiencies in the state wiretaps at the time of the intercept, and they acted to head off what they reasonably believed would be an obstruction of justice. Moreover, the extent of communication between the State and Federal Governments was drastically limited to that sufficient to accomplish their joint purpose. Additionally, Judge Brieant found that Ostrer had failed to bear his initial burden of demonstrating taint of the federal trial and that, in any event, the Federal Government had amply demonstrated that Ostrer's conviction was unaffected by any information turned over to the federal prosecutor by the State. (App. 702-04).*

Secondly, Judge Brieant rejected Ostrer's Sixth Amendment claim. He found first that this would be an "undesirable and inappropriate" (App. 708) case in which to apply a *per se* rule of reversal. He noted that the initial state intercept was by a Detective who believed the wiretap was lawful and did not know that November was an attorney. While Assistant District Attorney Fine knew November was a lawyer, he in good faith believed that November was counselling a criminal act and, in informing McGuire of his concern, was "motivated solely by a high minded sense of ethical obligation to insure proper and unobstructed administration of federal criminal justice." (App. 707). Indeed, Judge Brieant found that to apply a rule of deterrence in this case "would only serve to chill necessary communications between state and federal law enforcement authorities." (App. 708).

Turning to Ostrer's claims of Sixth Amendment prejudice, Judge Brieant found that Assistant United States Attorney McGuire "did not rely upon Fine's information

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* Ostrer's brief does not contest Judge Brieant's ruling on his Fourth Amendment claims.

in deciding not to call Moss as a witness, or in adhering to his prior decision not to do so." (App. 710).* Furthermore, Judge Brieant concluded that even assuming the Assistant had reached his decision not to call Moss based on the State's information, Ostrer had not suffered any prejudice thereby.

An understanding of this latter conclusion requires a brief discussion of the evidence at Ostrer's federal trial and the nature of Moss' testimony before the Grand Jury and the SEC. Judge Brieant summarized the Government's case against Ostrer as follows:

> "On January 4, 1973, the trial of Dioguardi and Ostrer on this indictment began before Chief Judge Edelstein of this Court and a jury. A full exposition of the facts adduced at trial appears at 492 F.2d 70 (2d Cir. 1974) with which familiarity is assumed. We discuss the evidence below only with regard to the case proved against Ostrer.
>
> The case against Ostrer was presented primarily through the testimony of Hellerman, the chief manipulator in the Belmont scheme. Hellerman described the scheme by which the price

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* With respect to the transfer of information concerning the investigator Jim Lynch, the Judge found:

> "Lynch's employment had no bearing on the issues in Ostrer's trial, and knowledge of the fact that Lynch was associated with the Ostrer defense was not used by the Government to Ostrer's detriment, nor could it be." (App. 695-96).

This conclusion was supported by McGuire's testimony that it was commonplace for the defense to hire private investigators in the sorts of cases he was trying in the United States Attorney's Office and that, to the extent he did anything with this information, he would have simply checked to see if Lynch was still on the federal payroll, as he apparently was not. (App. 441-44, 551-52).

of Belmont was to be manipulated from $5.00 or $6.00 per share in January 1970 to approximately $50.00 per share in May of that year. Hellerman testified that he offered Ostrer the opportunity to buy a portion of the Belmont stock issue at $15.00 per share, with the understanding that Hellerman would receive one-half of the profits and would guarantee Ostrer against any loss. Ostrer committed himself to purchase 14,000 of the approximately 28,000 outstanding shares at a cost of $210,000.00 Hellerman made arrangements to have others purchase the remaining 14,000 shares.

The other individuals whose participation Hellerman secured were able to pay for their shares, but Ostrer was unable to raise the $210,000.00 that he had committed himself to raise, and the selling brokers were waiting for his payment. Hellerman arranged, through Dioguardi, for Ostrer to borrow $60,000.00 from an organized crime figure, one Hickey DiLorenzo, at 1½% interest per week. Hellerman himself advanced Ostrer over $52,000.00 to cover Ostrer's obligation on 3,500 shares of stock. Ostrer, still having difficulty raising the balance that he owed on these shares, sought other financial sources.

Hellerman testified that Ostrer had mentioned several people to whom he was attempting to sell a portion of his allocated shares. One of the persons mentioned who was considering purchasing a portion of Ostrer's commitment was Aubrey Moss. Hellerman, on cross-examination by Mr. Edelbaum, Ostrer's trial counsel, testified that he understood that Ostrer had an agreement with Lee Evins to purchase a portion of Ostrer's allo-

cation, and that Ostrer would guarantee Evins against loss, and would share in Evins' profits. Hellerman also testified that Ostrer had an agreement with Fred Flatow for the purchase of shares.

In May 1970, the manipulation scheme failed when, without notice to the manipulators, the President of Belmont sold his "investment" stock through non-participating brokers. The market was unable to absorb this influx of shares. Hellerman was unwilling to purchase the shares himself, and unable to find other purchasers at the now inflated price. The market for Belmont stock collapsed, and Ostrer and others were left with considerable losses.

Ostrer attempted to hold Hellerman responsible for his losses, and Dioguardi subsequently arbitrated their dispute." (App. 697-99) (footnote omitted).

Based on Moss' sworn Grand Jury and SEC testimony, Judge Brieant found that Moss would have testified that he purchased from Ostrer 2,000 shares of Belmont stock with the agreement that the profits would be split 50-50 and Ostrer would hold Moss harmless against any losses. (App. 700).*

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* There was abundant support for this finding. When called before the SEC, Moss testified that Ostrer had approached him in March of 1970; told him that he had stock of a company (Belmont) that had made some acquisitions and had a good future; and asked him to buy 2,000 shares of the company for $30,440, in return for which Ostrer would provide him with a hold harmless agreement and 50-50 share in any profits. (App. X 132-134). Moss denied that Ostrer had told him anything more than that he expected the stock to go up. (App. X 135-137, 142-143).

[Footnote continued on following page]

Against this factual background, Judge Brieant rejected Ostrer's claim that, had Moss testified as a Government witness, Moss' testimony would have cast serious doubt upon the truthfulness of Hellerman's testimony, in that it would have demonstrated that Ostrer had agreed to give half of his profits to Hellerman and the other half to Moss and two others, Lee Evins and Fred Flatow, leaving Ostrer with no share in the profits of the illegal scheme. Judge Brieant found:

> ". . . Moss' testimony would not necessarily have been exculpatory of Ostrer. . . . We assume that Moss would have testified that he purchased 2,000 shares pursuant to a written agreement that he and Ostrer would share profits '50 50' and that Ostrer would guarantee him against loss. Proof of such an agreement would compel the inference that Ostrer had reason to believe that there would be no loss. In view of the already inflated price at which Belmont was selling, this inference would be consistent with the Government's theory, and suggest that the stock was being manipulated, and Ostrer knew it. Why else would he, as an experienced businessman, sign such a paper?
>
> The '50-50' provision of this agreement, when considered together with a similar agreement with Hellerman, would have demonstrated that Ostrer

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Moss' testimony before a federal Grand Jury in March, 1971 was substantially the same. He reiterated that he had spent over $30,000 for a stock about which Ostrer had simply told him he expected to go up. (App. X 151, 154). Moss added, that Ostrer had repaid him $12,500 in September or October of 1970 (one to two months after Moss' appearance before the SEC) and that Ostrer had also made a payment on March 8, 1971 (approximately two weeks before Moss' Grand Jury appearance, an appearance Ostrer knew about). (App. X 155-56).

gave up all profit, but did so only as to these 2,000 shares, and presumably the 4,000 shares sold to Evins and Flatow under similar terms. According to the testimony of Hellerman, Ostrer had committed himself to purchase 14,000 shares. Ostrer was able to raise enough money to control approximately 8,000 shares. Since the success of the manipulation depended upon control, by the conspirators of all the outsanding shares, it was imperative that the remaining shares be purchased; if not by Ostrer himself, then by persons who would follow his instructions. To park these shares, and insure the success of the entire manipulation, and to protect his share of the profit in 8,000 shares, Ostrer could well afford to forego all his participation in profits on the other 6,000 shares and indemnify losses.

Ostrer could agree to hold his purchasers harmless because the terms of his agreement with Hellerman provided him with indemnification against loss. Thus, although Moss' testimony certainly would have been relevant, it may not have exculpated Ostrer in the minds of the jurors. Rather, it might have shown guilt." (App. 711-12).

The Court also noted that, while Moss' failure to testify to the 50-50 arrangement was now claimed to be prejudicial, no application had been made to have Moss called as a court witness at the trial and no effort was made to authenticate the Ostrer-Moss written agreement by offering the testimony of persons familiar with their signatures. Also, the record revealed no request by the defense to have the Government stipulate to the authenticity of the document. (App. 701-02).

Finally, Judge Brieant concluded that, if Moss' testimony were treated as the evidence claimed to be "newly

discovered," the evidence did not require a new trial. This was so because the evidence was not newly discovered after trial; the agreements between Ostrer and Moss, Evins and Flatow were well known to the defense prior to trial. Moreover, the evidence would not have produced a different verdict:

> ". . . Moss' testimony regarding the agreement, rather than refuting Hellerman's testimony, was consistent therewith, and also consistent with the Government's theory of the case." (App. 715).

ARGUMENT

POINT I

The District Judge correctly rejected Application of a *Per Se* Rule of Reversal in this Case.

A. The *Per Se* Rule of Reversal is Reserved for Cases in which the Government's Intrusion into Attorney-Client Discussions is "of the grossest kind,"* "ruthless beyond justification,"** or "manifestly and avowedly corrupt."***

Relying primarily on cases decided through 1967, Ostrer proposes that a conviction must *automatically* be reversed whenever (1) someone employed by the Federal or State Government has unlawfully overheard a lawyer-client strategy meeting; (2) any part of the information

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* *Hoffa* v. *United States*, 385 U.S. 293, 306 (1966).

** *United States* v. *Rosner*, 485 F.2d 1213, 1227 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

*** *United States* v. *Gartner*, 518 F.2d 633, 637 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3238 (U.S. 1975).

gained thereby is communicated, by any means, to the prosecutor of the case; and (3) it is possible to conceive of a way in which the defendant may have been prejudiced thereby, even though there is uncontradicted sworn testimony to the contrary and no factual basis exists to support the possibility of prejudice other than points (1) and (2). It is unnecessary to discuss whether or not the 1967 case law might provide some basis for this ritualistic approach, since the 1976 case law in this Court is clearly to the contrary.

Only by reading the major Second Circuit cases with blinders does Ostrer avoid recognizing that his contentions have been firmly rejected by this Court repeatedly over the last few years. In two recent cases the Court took the opportunity to spell out the proper standards for reversal in cases involving Government intrusion into the attorney-client relationship while harmonizing the very cases on which Ostrer principally relies. Holding that the circumstances in *United States* v. *Rosner*, 485 F.2d 1213, 1227-28 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974), did not warrant application of a *per se* Sixth Amendment rule of reversal, this Court clearly articulated the circumstances that would warrant application of such a rule:*

> "*A per se rule must . . . be thought of in terms of sanction against the Government rather than as a search for truth.* Illegal wiretapping may be so far beyond the bounds of governmental propriety that it is offensive to a rule of liberty under law. (Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967)). The use of a dummy

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* Counsel for Ostrer was also counsel in the *Rosner* case, where he unsuccessfully urged upon the Court contentions virtually identical to those he presses here.

defendant, the ultimate in the chicanery of unlawful intrusion, is cut from the same cloth. *See* United States v. Archer, [486 F.2d 670 (2d Cir. 1973)]; United States v. Rispo, [460 F.2d 965 (3d Cir. 1972)]; United States v. Lusterino, 450 F.2d 572 (2 Cir. 1971). The intrusion by a paid informer for the avowed purpose of listening to defense secrets is not different from planting an electronic listening device. Caldwell v. United States, [205 F.2d 879 (D.C. Cir. 1953)].

In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms are also moral judgments. They assess the guilt not of the defendant but of the Government. The Supreme Court in the *Hoffa* case considered *Coplon*, [191 F.2d 749 (D.C. Cir. 1951)], and *Caldwell*, *supra*, so strongly urged upon us by appellant, as cases which "dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." Hoffa v. United States, *supra*, 385 U.S. at 306, 87 S.Ct. at 416. When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge Cardozo's phrase. (People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926)). It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of law for all others. See Mr. Justice Holmes dissenting in Olmstead v. United States, 277 U.S. 438, 469, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

When the Government is not found guilty of such avowed corrupting conduct, however, the rule must, of necessity, be different. *See* United States

ex rel. Cooper v. Denno, 221 F.2d 626 (2d Cir.), cert. denied 349 U.S. 968, 75 S.Ct. 906, 99 L.Ed. 1289 (1955). *There is then no need to punish the prosecutor by freeing the defendant. The matter must then proceed to an ultimate adjudiction of whether the defendant was prejudiced in fact.*" 485 F.2d 1227-28 (emphasis supplied).

More recently, in *United States* v. *Gartner*, 518 F.2d 633 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3238 (U.S. 1975), this Court reiterated the views it expressed in *Rosner* and again found the case before it an unsuitable one for application of a *per se* rule:

> "When conduct of a Government agent touches upon the relationship between a criminal defendant and his attorney, such conduct exposes the Government to the risk of a fatal intrusion and must be accordingly carefully scrutinied. The *per se* rule may result in dismissal of the indictment or a reversal. It has been applied in the past to the Government's intrusion upon the attorney-client relationship of a defendant where that conduct has been an offensive interference with the defendant's rights without any justification. *The per se rule represents a moral as well as a legal condemnation of such egregious and unequivocal conduct for which sanctions are imposed against the Government as punishment regardless of the defendant's guilt. United States* v. *Rosner, supra; Hoffa* v. *United States*, [385 U.S. 293 (1966)]. Such conduct was found in *Coplon* v. *United States*, [191 F.2d 749 (D.C. Cir. 1953)] (wiretap conversations); *Caldwell* v. *United States*, [205 F.2d 879 (D.C. Cir. 1953)] (a planted informer in the defense camp); *United States* v. *Rispo*, 460 F.2d 965 (3d Cir. 1972), and *United States* v. *Lusterino*,

450 F.2d 572 (2d Cir. 1971), (dummy defendants tried with other defendants). While this Court has never adopted the *per se* rule of dismissal, it has in a most recent case cautioned that 'if circumstances warranted it we would not shrink from such a result.' *United States* v. *Rosner*, *supra*, 485 F.2d at 1228.

Where, however, the conduct of the Government has not been so manifestly and avowedly corrupt, the courts have applied a different and less rigid rule which attempts to measure the [illegible] or prejudice, if any, to the defendant rather than punish the prosecutor by freeing the defendant. *United States* v. *Arroyo*, 494 F.2d 1316 (2d Cir.), *cert. denied*, 419 U.S. 827, 95 S.Ct. 46 42 L.Ed. 2d 51 (1974), (Government informant mistakenly indicted as co-defendant); *United States* v *Rosner*, *supra*, 485 F.2d at 1227-28, (co-defendant decides to cooperate with the Government); *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed. 2d 575 (1974), (telephone conversations of incarcerated defendant monitored by jail officials for security reasons); *United States* v. *Mosca*, [475 F.2d 1052 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973)] (co-defendant cooperating with the Government); *cf. Taglianetti* v. *United States*, 398 F.2d 558 (1st Cir. 1968), *aff'd per curiam*, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed. 2d 302 (1969), (auditing of attorney-client telephone conversation on unrelated case); *United States* v. *Lebron* 222 F.2d 531 (2d Cir.), *cert. denied*, 350 U.S. 876, 76 S.Ct. 121, 100 L.Ed. 774 (1955), (presence of Government informant at pretrial meeting where no trial strategy discussed); *see United States ex rel. Cooper* v. *Denno*, 221 F.2d 626 (2d Cir.), *cert. denied*, 349

U.S. 968, 75 S.Ct. 906, 99 L.Ed. 1289 (1955), (police officer seated near counsel table for security reasons)." 518 F.2d at 637 (emphasis supplied).

See also United States v. *Mosca*, 475 F.2d 1052 (2d Cir. 1973); *United States* v. *Arroyo*, 494 F.2d 1316 (2d Cir. 1974).

Ostrer does not so much deal with this settled law of the Second Circuit as ignore it.* Instead he relies on two old cases from the District of Columbia Circuit, *Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1951); *Caldwell* v. *United States*, 205 F.2d 879 (D.C. Cir. 1953), and two ambiguous *per curiam* opinions from the Supreme Court, *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967), all cases in which an intrusion on an attorney-client conversation resulted in reversal of a conviction and a new trial, but also all cases that were briefed and argued to this Court in *Rosner*.

The impact of these four cases has been considerably illuminated by the Supreme Court's decision in *Hoffa* v. *United States*, 385 U.S. 293 (1966). *Coplon* and *Caldwell*, the *Hoffa* Court noted, both involved a "government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." *Id.*,

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* Ostrer's [illegible]ne attempt to distinguish *Rosner* and *Gartner* (Br. at 23) conveniently overlooks the fact that this Court in both cases employed alternative holdings. Both decisions hold that not only were no actual intrusions demonstrated but also that the conduct of the Government was not so egregious as to warrant application of a *per se* rule. Ostrer also ignores the fact that the Court went to great lengths in both cases to harmonize the very opinions on which he places principal reliance and in each case held that only conduct of the most reprehensible sort would warrant application of a *per se* rule.

at 306. And, assuming the correctness of those District of Columbia cases and citing *Black*, the *Hoffa* Court went on to observe that a conviction would "presumptively" be set aside as constitutionally defective if the governmental intrusion was "sufficiently similar to what went on in *Coplon* and *Caldwell* to invoke the rule of those decisions." *Id.*, at 307. In short, as this Court has repeatedly recognized, the *per se* rule of reversal has applicability only where the governmental intrusion is "of the grossest kind." *Id.*, at 306. *See United States* v. *Gartner*, *supra*, 518 F.2d at 637; *United States* v. *Rosner*, *supra*, 485 F.2d at 1227-28; *United States* v. *Mosca*, *supra*, 475 F.2d at 1060-61.

Ostrer engages in belabored attempts to draw support for his absolutist position from *Black* and *O'Brien*. But in deriving his interpretation of those cases from the views and facts expressed by the dissenters in each, Ostrer places far more weight on the shoulders of those brief *per curiam* opinions, decided without the benefit of full briefing and oral argument, than they can bear. The five members of the Court who subscribed to the *Black* opinion presented no sustained theory of law, but simply ordered a new trial so that the petitioner would have "an opportunity to protect himself from the use of evidence that might be otherwise inadmissible." 385 U.S. at 29. That concern, no longer present in this case since the District Court has already determined that the Government has borne its burden of demonstrating that Ostrer suffered no prejudice, is glossed over by Ostrer who mistakenly draws from the *Black* dissent the suggestion that none of the information overheard in that case was used by the prosecution. (Br. at 19.) And in *O'Brien* the Court provided even less hint of its reasoning. It simply reversed in one sentence with a citation to *Black*. These two cases cannot fairly be read

to commit a divided Supreme Court, *sub silentio*, to any particular bright-line standard. Rather, in light of the more explanatory language of *Hoffa*, the cases can only properly support automatic reversal when the Government conduct has been "of the grossest kind." 385 U.S. at 306.

This conclusion, with which this Court agreed in *Rosner*, *Mosca* and *Gartner*, has also been reached by the Fifth Circuit in a case remarkably similar to this one. In *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974), the defendant was held in federal custody in a state facility. For security reasons, state prison officials monitored a telephoned conversation between the defendant and his attorney. The monitoring was conducted without the authorization or approval of the Federal Government, and the federal authorities were unaware of the state practice. The State turned a report of the conversation over to the Federal Bureau of Investigation.

Following an analysis similar to the one above, the Fifth Circuit distinguished the Supreme Court's *Black* and *O'Brien* decisions and refused to apply a *per se* rule of reversal.

> "In light of the discussion in *Hoffa* with regard to 'intrusion of the grossest kind, and the fact that neither *Black* nor *O'Brien* expressly states that any undisclosed overhear, regardless of circumstances or relevancy, violates the Sixth Amendment, we decline to adopt such a rule. Instead, we proceed to consider the circumstances which led to the overhear and the question of whether the overhear could have in any fashion tainted the conviction.
>
> The overhear involved in the instant case resulted from the actions of the state officials. There

> is no indication that defendant's telephone conversations were monitored for the purpose of gaining information to use at his trial, a practice we would immediately proscribe with appropriate remedy. Instead, testimony adduced at an adversary hearing on the question disclosed that state prison officials followed a practice of monitoring some of the telephone conversations of prisoners in their custody for security reasons. The surveillance was neither authorized nor approved by federal authorities. Indeed, there was no evidence that the Federal authorities were aware of the state practice. We therefore conclude that the facts presented do not demonstrate the type of governmental intrusion upon the confidential relationship between defendant and his counsel which would, without more, require a new trial.
>
> Concluding that neither the type of overhear, standing alone, nor the circumstances surrounding it resulted in a violation of the right to counsel, the question remains whether the overhear tainted defendant's conviction. . . . Defendant does not seriously contend and we cannot conclude that this conversation in any way tainted defendant's conviction." 484 F.2d 424-25 (footnote omitted).

See also South Dakota v. *Long*, 465 F.2d 65, 71-72 (8th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973).

Most recently, the Sixth Circuit has rejected Ostrer's *per se* approach and joined the growing body of authority for the rule that, absent gross Government misconduct, prejudice must be shown before a conviction obtained following a Government intrusion into the attorney-client relationship will be reversed. In *United States* v. *Valencia*, Docket Nos. 75-1342, 75-1343, 75-1344 (6th Cir. Sept. 2, 1976), the Government employed as an informer the secretary to defendant Company's attorney. The secretary took notes on discussions between Company and the attorney concerning a prior, but related, prosecution.

However, noting indications that the Government's case against Company and his co-defendants may have existed independently of any information obtained from the secretary, the Sixth Circuit refused to reverse outright. Rather, the Court followed *Rosner* and remanded the case for a hearing to determine whether the defendants had been prejudiced in fact.

> "[W]e believe that no necessary inference of prejudice with respect to appellants can be made on the basis of the government's intrusion into the privileged relationship between attorney and client. The more recent authority indicates that there must be a showing of prejudice as well as a showing of an intrusion into the privileged relationship, *United States* v. *Rosner*, 485 F.2d 1213 (2nd Cir. 1973), *cert. denied*, 417 U.S. 950 (1974), *United States* v. *Mosca*, 475 F.2d 1052 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973), *South Dakota* v. *Long*, 465 F.2d 65 (8th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973), *People* v. *Pobliner*, 32 N.Y. 2d 356, 298 N.E. 2d 637, 345 N.Y.S. 2d 482 (1973), although cases from the District of Columbia Circuit have indicated that a showing of a *gross* intrusion into the attorney-client relationship is sufficient to warrant a reversal of conviction and award of a new trial without a showing of prejudice. *Caldwell* v. *United States*, 205 F.2d 879 (1953), *United States* v. *Coplon*, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952)." *United States* v. *Valencia*, *supra*, slip op. at 8 (emphasis in original).

In short, it is the settled law of this Circuit—and the correct reading of the cases—that automatic reversals of convictions in cases involving Government intrusion into attorney-client conversations will be ordered only where the Government intrusion is "of the grossest kind," *Hoffa* v. *United States*, *supra*, 385 U.S. at 306, "ruthless beyond justification," *United States* v. *Rosner*, *supra*, 485 F.2d at 1227, or "manifestly and avowedly

corrupt," *United States* v. *Gartner*, *supra*, 518 F.2d at 637. In all other cases before ordering a new trial the Court must "proceed to an ultimate adjudication of whether the defendant was prejudiced in fact." *United States* v. *Rosner*, *supra*, 485 F.2d at 1228. *See also United States* v. *Gartner*, *supra*, 518 F.2d at 637; *United States* v. *Mosca*, *supra*, 475 F.2d at 1060-61.*

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* The other cases relied upon by Ostrer are not to the contrary. While dicta in the cases often refer to the difficulty of ascertaining the precise degree of prejudice in situations involving invasion of the attorney-client relationship, in fact automatic reversals have been approved only where the Government conduct was, or was alleged to be, truly reprehensible, *United States* v. *Zarbour*, 432 F.2d 1 (5th Cir. 1970) (paid confidential informant for FBI acted as investigator for defendant's attorney, participating in defendant's conferences with his attorney, assisting in developing defendant's defense and sitting with counsel at trial, informant had provided FBI with information concerning the bank robbery for which defendant was convicted); *United States* v. *Rispo*, 460 F.2d 965 (3d Cir. 1972); (Government allowed the entire trial of defendant and others to proceed to conviction without revealing that one co-defendant was in fact a paid Government informer); *United States ex rel. Cooper* v. *Denno*, 221 F.2d 626 (2d Cir.), *cert. denied*, 349 U.S. 968 (1955) (undercover police officer sat near defense table during trial allegedly for the purpose of overhearing defense strategy); *Bursey* v. *Weatherford*, 528 F.2d 483 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3738 (U.S. 1976) (*Rosner* distinguished, since *Bursey* involved the "dummy defendant, the ultimate in the chicanery of unlawful intrusion," 528 F.2d at 487, quoting 485 F.2d at 1227), or where the intrusion into the attorney-client relationship was considerable, *Glasser* v. *United States*, 315 U.S. 60 (1942) (defendant forced to accept counsel who also represented a co-defendant with conflicting interests); *Geders* v. *United States*, 44 U.S.L.W. 4420, (U.S. 1976) (defendant denied access to his counsel during seventeen-hour trial recess). There is no reason to believe that this Court would have reached different results in the above-cited cases under the *Rosner* rule. The instant case, however, in which state officials did not seek to overhear attorney-client discussions, in which the single such discussion overheard was reasonably

[Footnote continued on following page]

B. The Government's Conduct in this Case is Not of a Sort Calling for Application of the *Per Se* Rule of Reversal.

By seeking to enlarge the applicability of the *per se* rule of reversal, Ostrer implicitly recognizes that the Government conduct in this case cannot possibly support a *per se* reversal under the existing law set out in *Hoffa*, *Rosner* and *Gartner*. Ostrer's implicit concession is well-founded.

Judge Brieant, assessing the extent of alleged Government "misconduct" in this case and quoting from this Court's opinion in *Gartner* (App. 705), concluded that application of a *per se* rule in this case would be both "undesirable and inappropriate." (App. 708). This conclusion is amply supported by the facts of this case, which do not even remotely suggest improper conduct by the District Attorney's Office or the Federal Government, much less the "manifestly and avowedly corrupt" conduct referred to in *Gartner*.

Ostrer attempts to avoid the obvious correctness of Judge Brieant's ruling by arguing that "there is no principled way of distinguishing the instant case from *O'Brien* or *Black*" (Br. at 21) and then blindly calling for the result of those cases. He ignores, however, the critical distinction that, unlike this case, the electronic surveillance in both of those cases was conducted by *federal officers* during a *federal trial*. For purposes of

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believed to evidence an unprivileged conspiracy to obstruct justice and in which only that information necessary to prevent the threatened crime was transmitted to federal officials, is simply not comparable, either in terms of the offensiveness of the Government conduct or the extent of the intrusion. See pp. 32-36, *infra*.

determining whether to invoke a *per se* rule of reversal of a federal conviction, it is entirely appropriate to view any misconduct by federal officers, at least nominally under the control of the prosecution, as far "grosser" than similar conduct by state officers totally free of federal control or influence. *Cf. United States* v. *Janis*, 44 U.S.L.W. 5303, 5309-10 (U.S. 1976); *Giglio* v. *United States*, 405 U.S. 150 (1972); *United States* v. *Maggadino*, 496 F.2d 455, 460-61 (2d Cir. 1974). Indeed, were the mere communication between state and federal officials in this case sufficient to invoke the *per se* rule of reversal under *Black* and *O'Brien*, it would be impossible for the Federal Government to protect itself against contamination of its prosecutions by persons over whom it has no control.*

Unblinking adherence to the results in *Black* or *O'Brien* cannot and should not decide this case. Rather, analysis of the facts of the intercept and subsequent

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* This practical approach to distinguishing *Black* and *O'Brien* from the instant case does not revive the discredited "silver platter" doctrine. Under present law, evidence illegally seized by state officials is excluded from most, *Elkins* v. *United States*, 364 U.S. 206 (1960), but not all, *United States* v. *Janis*, *supra*, federal proceedings. But, as the Fifth Circuit has explained,

> "We do not here deal with whether to admit evidence, harmful to the appellant, which was gathered by state authorities in violation of constitutional rights. Rather, we are concerned with the circumstances and scope of the intrusion on the attorney-client privilege. Our question is whether the intrusion, by either state or federal officers, is so gross as to justify a new trial regardless of the relevancy of the information obtained. In our opinion it is relevant to this issue that the overhear was by state officials, solely in the discharge of their prison security responsibilities, rather than by federal officials seeking to facilitate their prosecution of the appellant."

United States v. *Brown*, 484 F.2d 418, 425 n. 2 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

state and federal conduct involved here—so similar to the events in *United States* v. *Brown*, *supra*—conclusively demonstrates the wholly innocent behavior of the responsible officials.

First, the eavesdropping on Ostrer's conversations was in no sense a deliberate attempt to infiltrate the defense camp and obtain defense strategy. Rather, the eavesdropping was conducted as part of an entirely distinct State investigation of Ostrer and pursuant to a court order that the State authorities believed to be supported by probable cause. (App. 705-06). The intercept of the November 21 conversation between Ostrer and November, moreover, was by a Detective who did not, and under the circumstances reasonably could not, know that November was an attorney. (App. 706).

Second, once this information had been obtained the State authorities acted properly in conveying their reasonable belief that an obstruction of justice was in the offing to the federal authorities. Although Chief Assistant District Attorney Scotti and Assistant District Attorney Fine knew November was an attorney, each reasonably believed that the November 21st conversation revealed November's involvement in a crime, and it is, as Judge Brieant recognized, well settled that the counselling of a crime or a fraud is outside the protection of the attorney-client privilege. (App. 706, 730 n.17). See *Grieco* v. *Meachum*, 533 F.2d 713, 718 n.4 (1st Cir. 1976); *United States* v. *Hoffa*, 349 F.2d 20, 37 (6th Cir.), *aff'd*, 385 U.S. 293 (1966); *United States* v. *McCarthy*, 292 F. Supp. 937, 949 (S.D.N.Y. 1968).

Third, in communicating with the federal authorities, the State officials, "motivated solely by a high-minded sense of ethical obligation," revealed only the "minimum information necessary" to avert an obstruc-

tion of justice. (App. 706-07). The state authorities, through Assistant District Attorney Fine, told the federal prosecutor only that they believed Ostrer would tamper with Moss. Fine did not tell Assistant United States Attorney McGuire how this would be accomplished, nor how the District Attorney's office knew about this. There was no reason for McGuire to infer that the source of the information was electronic surveillance, much less that it was derived from a conversation between Ostrer and November. (App. 707).*

Lastly, it was demonstrated that the information transmitted had no effect whatsoever on the conduct of the federal trial.

In the light of these facts, Judge Brieant's conclusion that application of a *per se* rule of reversal would be inappropriate, indeed, illogical, cannot be fairly criticized. To employ a *per se* rule of deterrence in a case such as this would be to deter communications that simply *should not be discouraged*:

> 'At each step in this limited transmission of information, the official action, state and federal, was pursued in complete good faith. There is no single act of misconduct or negligence, repetition of which must be deterred; rather, a rule of deterrence would only serve to chill necessary communications between state and federal law enforcement authorities. Under the circumstances of this case, application of the *per se* rule would be undesirable and inappropriate." (App. 708; *see also* App. 703-04.)

The Government conduct in this case was manifestly not "of the grossest kind," *Hoffa* v. *United States*, *supra*,

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* Judge Brieant correctly noted that the source of such information is most often a confidential informant. (App. 707).

385 U.S. at 306. Accordingly, Judge Brieant properly rejected application of the *per se* rule of reversal and moved on to consider whether Ostrer had in fact been prejudiced by the intercepted communication.

POINT II

Ostrer Suffered No Prejudice As A Result of the State's Transfer of Information to the Federal Government.

Ostrer argues that Judge Brieant was in error when he found that the Government had sustained its burden of proving that the information supplied by the State did not, in fact, prejudice Ostrer in any way. Initially, Ostrer attacks Judge Brieant's finding that McGuire decided not to call Aubrey Moss as a witness based on factors wholly independent of the State's information. Next, Ostrer contends that Judge Brieant was in error in finding that, even if Moss had been called as a witness, his testimony would not have aided Ostrer's defense. And lastly, Ostrer argues that Judge Brieant erred in concluding that the defense could have presented on its own all the evidence it now claims it was denied the opportunity to introduce by the Government's failure to call Moss. Only if Ostrer prevails on all three of these contentions will he show that he was prejudiced in fact by the State intrusion on his November 21, 1972 conversation with November. All three contentions, however, are without merit.

Ostrer scores as "mind reading" and "Monday morning quarterbacking" (Br. at 33), Judge Brieant's finding that Assistant United States Attorney McGuire decided not to call Moss as a witness based on factors

wholly independent of the State's information. On the contrary, the finding was premised on documentary evidence and testimony from witnesses whom the Court found to be "high-principled and truthful men." (App. 707).*

The testimony at the hearing revealed that when Assistant District Attorney Fine told Assistant United States Attorney McGuire of the possible tampering with Moss, McGuire replied that Fine had no reason to be concerned because McGuire had not, in any event, intended to call Moss as a witness. (App. 329, 331-32, 389-90, 694). At the hearing McGuire explained in detail what had transpired prior to his meeting with Fine that led him to conclude that Moss should not be called as a Government witness. (App. 403-04).

These events were substantially as follows: Considerably before his meeting with Fine, McGuire had read the transcripts of Moss' August 13, 1970 SEC testimony and his March 13, 1971 Grand Jury testimony. On both occasions Moss had testified that, although he was a successful businessman (president of a New Jersey metal company), he had purchased $30,000 of Belmont stock simply because Ostrer told him it was a good investment, and not because Ostrer had told him the stock was being manipulated.** Moss later stuck to this story when McGuire interviewed him on November 21, 1972. McGuire, who was well acquainted with Belmont's meteoric price history, found this story completely incredible and decided at that time that Moss would not be a helpful

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* Notably absent from the group of witnesses whom the Court so characterized was Julius November. (See App. 707).

** The transcripts of Moss' testimony appear at App. X 125-156 and make revealing reading.

Government witness.* McGuire arrived at this conclusion, Judge Brieant found, "independently and prior to meeting with Fine or being informed that there appeared to be an effort to intimidate Moss." (App. 694-95, see also App. 709).

Judge Brieant also addressed Ostrer's argument that, since McGuire candidly admitted that, prior to his meeting with Fine, he had not ruled Moss out as a witness to a mathematical certainty, something may have occurred at the trial which, but for Fine's information, would have caused McGuire to change his strategy and call Moss as a witness. Relying on McGuire's testimony concerning his initial reasons for viewing Moss as an incredible and dangerous witness and his further testimony that nothing happened at the trial that gave him the remotest cause to reconsider his earlier decision (App. 365), Judge Brieant made the following finding:

> "Ostrer contends that following Hellerman's cross-examination, the Government's case was in jeopardy, and that, if McGuire had not been counselled otherwise by Fine, McGuire would have reconsidered his trial strategy, and called Moss to bolster the Government's case. *McGuire testified, and I believe, that nothing occurred to change his trial plans, and the jury's verdict bears out McGuire's assessment.* We, therefore, find that McGuire did not rely upon Fine's information in deciding not to call Moss as a witness, or in adhering to his prior decision not to do so." (App. 709-10) (emphasis supplied).

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* Ostrer's trial counsel Maurice Edelbaum agreed. "[F]rom my talk with [Moss], I thought he would be a poor witness for the government. . . ." (App. 478).

This finding, based on the Court's assessment of the demeanor of witnesses and documentary evidence, can in no sense be viewed as erroneous.

If this Court agrees—and we are confident it will—that Judge Brieant did not err in concluding that the federal prosecutor's conduct of the trial was unaffected by the State's information, it will be unnecessary to consider Ostrer's equally unconvincing arguments that Judge Brieant was also incorrect in concluding that, even assuming *arguendo* McGuire's decision not to call Moss was based upon the State's information, Ostrer would still have suffered no prejudice. We are unable to improve upon Judge Brieant's thorough and persuasive analysis of the trial record, leading him to conclude that, had Moss testified, his testimony would have been consistent with the Government's theory of guilt and that, in any case, alternative methods existed by which Ostrer could have introduced all the information he might have developed by cross-examining Moss. (App. 710-715). Accordingly, we shall place principal reliance on the District Court's opinion and limit our response to a number of the misleading attacks Ostrer directs at the District Court's decision.

Ostrer, for the first time on this appeal, suggests that the District Court's conclusions about the impact of Moss' testimony must be reassessed in light of Hellerman's trial testimony that a fourth person by the name of "Kaufman" may have had a 50-50 profit sharing agreement with Ostrer for an unspecified amount of Belmont stock. (Br. at 35). He argues that, if Kaufman had such an agreement, then Moss' testimony would have further tended to undermine Hellerman's testimony that he, too, had a 50-50 profit sharing arrangement with Ostrer. (Br. at 38). The recent vintage of this claim is only a partial reflection of its complete disingenuousness.

Hellerman's trial testimony was simply that "a man with a K, a Kaufman or something like that" *may have had an agreement with Ostrer*, but Hellerman did not know for sure. (Trial Tr. 814-16). From this testimony, Ostrer feels free to conclude in his brief that "there were thus four persons whom Ostrer induced or persuaded to purchase part of his allotment of Belmont Franchising stock." (Br. at 35). But not only does Hellerman's testimony provide scant support for this factual conclusion, Ostrer's February 1975 affidavit in support of his motion for a new trial totally belies it. In paragraphs 8 and 9 of Ostrer's affidavit, he names the persons with whom he had 50-50 profit sharing agreements. Mention is made only of Aubrey Moss, Lee Evins and Fred Flatow. Needless to say, there was not even the slightest suggestion during the three-day hearing below or in his post-hearing memoranda that Ostrer had such an arrangement with a fourth party.

More significantly, whether a Kaufman agreement existed or not, Ostrer argues his claim of prejudice as if, through Moss, he could have introduced not only his agreement with Moss, but his agreements with Evins and Flatow and the mysterious Kaufman as well. (See Br. at 37-38, 40.) There is simply nothing in the record that suggests Moss had knowledge of anything more than his own agreement with Ostrer. In assessing any prejudice to Ostrer caused by the failure to call Moss as a witness, the appropriate inquiry is simply what Moss could have added to the record. Judge Brieant correctly determined that Moss would have added nothing of value to the defense and that what information Moss had could have been introduced equally effectively by way of his written agreement with Ostrer.

POINT III

Ostrer Was Given a Full And Fair Opportunity To Explore Whether His Trial Was Tainted.

During his meeting with Assistant United States Attorney McGuire on December 22, 1972, Assistant District Attorney John Fine took contemporaneous notes, which he later inserted into his case file. However, when he examined the District Attorney's files shortly before the hearing he was unable to find the notes. (App. 299-302). At the request of Ostrer's counsel, the District Attorney's files were reexamined by Assistant District Attorney Austin Campriello after the hearing, and by letter dated March 12, 1976, Campriello informed the Court that he had twice examined the relevant files and he, too, was unable to find Fine's notes. Ostrer argues, as he did below, that, to the extent he was unable to demonstrate prejudice, his failure to do so was attributable to the loss of the notes prepared by Fine and that "the Government should be taxed with a strong inference that the missing memorandum contains information favorable to the defendant. . . ." (Br. at 43). This claim, a desperate attempt to remedy Ostrer's utter failure to produce any proof of prejudice, is meritless.

Ostrer was in no sense deprived of a full and fair opportunity to demonstrate prejudice. He was given an opportunity to examine both former Assistant District Attorney Fine and former Assistant United States Attorney McGuire, both of whom Judge Brieant found to be "high-principled and truthful men." (App. 707). Both men testified that the December 22, 1972 meeting was brief and that Assistant District Attorney Fine conveyed very little information to McGuire. Both Fine and former Chief Assistant District Attorney Alfred

Scotti testified at the hearing that Fine was under strict instructions to convey to the federal prosecutor *only* information that indicated a possible unlawful obstruction of the Federal trial. The State officials were greatly concerned not to jeopardize the security of the State's investigation and so took care not to reveal anything more than the minimum necessary to alert the Federal Government to the perceived danger.

While an adverse inference such as is suggested by Ostrer may sometimes be used to bolster a weak showing, it cannot stand alone, as Ostrer would have it, as the entire proof of prejudice. In these circumstances, and in the absence of any suggestion in the record that the notes were deliberately destroyed, Judge Brieant was fully justified in declining to draw the adverse inference suggested by Ostrer. See II Wigmore, Evidence § 291 (3d ed. 1940).*

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* Ostrer further contends that the inference was particularly appropriate here, because in April 1973, after Ostrer's trial, Assistant United States Attorney McGuire learned from Fine that the source of the State's information had been electronic surveillance of a conversation between Ostrer and November, but McGuire did not promptly alert the defense to this fact. He claims that it was misconduct on the part of McGuire not to alert the defense to these facts and that, if he had acted properly, Fine's notes might have been requested by the defense at a time when they could have been located.

It is sufficient to note that in April 1973 Assistant United States Attorney McGuire knew, as Judge Brieant has now found, that the State's information had not had the slightest effect on the federal trial. He had simply been informed that a witness might be tampered with whom he had not intended to, and did not, call to testify. He also believed that the State's wiretap had been completely lawful and that the intercepted conversations were not privileged. If under these circumstances Mr. McGuire was obliged by some ethical obligation to anticipate Ostrer's farfetched claim of prejudice and inform the defense of the State's intercept, we are unaware of what it might be.

POINT IV

In any Event, the Information Transmitted to the Federal Government Was Not Privileged under the Sixth Amendment.

Throughout his brief Ostrer proceeds on the erroneous premise that his November 21, 1972 conversation with Julius November was protected by the attorney-client privilege and therefore the Sixth Amendment. While Judge Brieant did not rule on the question—finding against Ostrer even on the supposition that the conversation was privileged—he made sufficient findings of fact to mandate, as a matter of law, the conclusion that the conversation was not privileged. If this Court agrees that the conversation was not privileged, there is no need to determine the standard of reversal in cases involving Government overhears of privileged conversations, nor to determine whether any Sixth Amendment prejudice resulted from the overhear in this case.

The November 21, 1972 conversation was not privileged because the state law enforcement officials had reasonable grounds to believe Ostrer and November were planning to violate § 135.60 of the New York Penal Law (McKinney's 1975) by intimidating Moss into not testifying.*

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* The conversation was also not privileged because it was conducted in the presence of two third parties, Greenfield and Kilroy. (App. X 80-99). Ordinarily the attorney-client privilege, whose purpose is the encouragement of confidential communications, *United States* v. *Fisher*, 44 U.S.L.W. 4514, 4518 (U.S. 1976), is destroyed when third parties are present at an oral communication. *United States* v. *Blackburn*, 446 F.2d 1089, 1091 (5th Cir. 1971); *Cafritz* v. *Koslow*, 167 F.2d 749, 751 (D.C. Cir. 1948); VIII Wigmore, Evidence § 2311 (McNaughten rev. 1961); McCormick, Evidence, § 91, at 187-91 (2d ed. 1972). *See also In re Horowitz*, 482 F.2d 72 (2d Cir. 1973); *United States* v. *McDonald*, 313 F.2d 832 (2d iCr. 1963); § 91, at 187-91 (2d ed. 1972); *Colton* v. *United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

See p. 10 *supra*. As Judge Brieant recognized, the attorney-client privilege provides no shield to discussions of the commission of present or future criminal acts. (App. 706). See also *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *Grieco* v. *Meachum*, *supra*; *United States* v. *Friedman*, 445 F.2d 1076, 1085-86 (9th Cir. 1971); *United States* v. *Hoffa*, 349 F.2d 20, 37 (6th Cir.), *aff'd*, 385 U.S. 293 (1966). Nor need future intended illegality be shown beyond a reasonable doubt before the privilege is defeated. Rather "[t]o drive the privilege away, there must [only] be 'something to give colour to the charge;' there must be 'prima facie evidence that it has some foundation in fact.'" *Clark* v. *United States*, *supra*, 289 U.S. at 15, *quoting O'Rourke* v. *Darbishire*, [1920] A.C. 581, 604. See also *United States* v. *Friedman*, *supra*, 445 F.2d at 1086; *United States* v. *Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939).

Not only is the *prima facie* evidence that Ostrer and November were plotting a criminal act clear on the face of the November 21, 1972 conversation, but two courts have already certified it as such. On December 22, 1972, state officials obtained a warrant to continue the electronic surveillance by satisfying State Supreme Court Justice Jacob Grumet, on the basis of the November 21, 1972 conversation, that they had probable cause to believe that evidence of the crime of coercion in the first degree might be obtained by continued surveillance. (App. 690). More importantly, Judge Brieant found on the basis of the same conversation "that state law enforcement authorities believed in good faith that a criminal act to obstruct the federal prosecution appeared to be in preparation. Also, there was a reasonable basis in fact for their holding this belief." (App. 689) (footnote omitted).

This finding of "a reasonable basis in fact" for believing that Ostrer and November were scheming to commit criminal acts is tantamount to a finding of probable

cause, see *Carroll* v. *United States*, 267 U.S. 132, 162 (1925), and is sufficient to strip the November 21, 1972 conversation of all Sixth Amendment protection as a matter of law. Accordingly, the state's transmittal of the thrust of the conversation to the federal authorities violated none of Ostrer's Sixth Amendment rights.

CONCLUSION

The order denying Ostrer's motion for a new trial should be affirmed.

Respectfully submitted,

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